184

(1)

Supreme Court, U.S.
FILED

101160 MAR 21 2011

OFFICE OF THE CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT J. GIESING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

SHANNON M. DORVALL
IMHOFF & ASSOCIATES, P.C.
12424 WILSHIRE BLVD., STE. 770
LOS ANGELES, CA 90025
(310) 315-1100
shannondorvall@criminalattorney.com

LEGAL PRINTERS LLC, Washington DC • 202 747 2400 • legalprinters.com

QUESTIONS PRESENTED FOR REVIEW

Where state law prevents Petitioner from seeking direct appellate review of a criminal conviction and only allows for collateral review through a petition for a writ of *habeas corpus*, is Petitioner entitled to a delay of the start of the AEDPA one-year time limitation to allow time to seek review of denial of said petition in the United States Supreme Court?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 1

STATEMENT OF THE CASE 4

ARGUMENT 7

A. Nevada Law Requires Waiver of Right to Appeal Any Issues Except Jurisdiction As A Condition Of Plea Agreement 10

B. Nevada Generally Refuses to Hear Ineffective Assistance of Counsel Arguments on Appeal Without Earlier Evidentiary Hearing 11

C. The United States Court of Appeals for the Ninth Circuit Held That Where Defendant Must Waive Right to Appeal as Part of Plea, the Post Conviction Proceedings Are "Direct Review" Proceedings 12

D. The Circuits Are Split On The Issue of Treating Post Conviction Relief as Direct Review Where Appeal of Right is Barred 16

CONCLUSION 18

APPENDIX

A. United States Court of Appeals for the Ninth Circuit, Denial of Certificate of Appealability A-1

B. United States District Court, District of Nevada, Denial of Petition for Writ of *Habeas Corpus* and Denial of Certificate of Appealability A-2

C. Nevada State Supreme Court Clerk's Certification A-20

D. Nevada State Supreme Court Order of Affirmance A-22

E. District Court, Clark County Nevada Findings of Facts and Conclusions of Law A-35

F. District Court, Clark County Nevada Plea Agreement A-49

G. United States Court of Appeals for the Ninth Circuit Denial of Motion to Reconsider A-60

TABLE OF AUTHORITIES

Cases

Bridges v. Johnson,
284 F.3d 1201 (11th Cir. 2002) 17
Clay v. United States,
537 U.S. 522, 123 S.Ct. 1072 (2003) 13
Douglas v. California,
372 U.S. 353, 83 S.Ct. 814 (1963) 14
Foreman v. Dretke,
383 F.3d 336 (5th Cir. 2004) 17
Frasch v. Peguese,
414 F.3d 518 (4th Cir. 2005) 17
Gibbons v. State,
97 Nev. 520, 634 P.2d 1214 (1981)..... 12
Halbert v. Michigan,
545 U.S. 605 (2005). 8, 13, 14
Hemmerle v. Schriro,
495 F.3d 1069 (9th Cir. 2007). 13
Lawrence v. Florida,
549 U.S. 327, 127 S.Ct. 1079 (2007) 15, 16
Lopez v. Wilson,
426 F.3d 339 (6th Cir. 2005) (*en banc*) 17
Maes v. Sheriff,
86 Nev. 317, 468 P.2d 332 (1970)..... 10
Orange v. Calbone,
318 F.3d 1167 (10th Cir. 2003) 17
Pellegrini v. State,
117 Nev. 860, 34 P.3d 519 (2001)..... 8, 12
Summers v. Schriro,
481 F.3d 710 (9th Cir. 2007). .....*passim*

Statutes

28 U.S.C. § 1254(1) 1
28 U.S.C. § 2244(d) 7
28 U.S.C. § 2253 1
28 U.S.C. § 2253(c)(1)(A) 3
Nev.Rev.Stat. 174.035 12
Nev.Rev.Stat. 34.370 12
Nev.Rev.Stat. 34.390 14
Nev.Rev.Stat. 174.063 ..... 3, 11
Nev.Rev.Stat. 178.562(2) 10
Nev.Rev.Stat. 200.700 ..... 5, 6
Nev.Rev.Stat. 200.730 ..... 5, 6
Nev.Rev.Stat. 201.230 5

Rules

Ariz.R.Crim.P. 17.1(e) 12
Ariz.R.Crim.P. 32 ..... *passim*

Constitutional Provisions

U.S. Const. am. 6 1

OPINIONS BELOW

The Order denying a Certificate of Appealability issued by the U.S. Court of Appeals for the Ninth Circuit (App. 1, *infra*) is not reported. The Order denying a Motion for Reconsideration (App. __, *infra*) is not reported. The Order denying a Certificate of Appealability issued by the U.S. District Court for the District of Nevada (App. 2, *infra*) is not reported.

STATEMENT OF JURISDICTION

The Order denying a Certificate of Appealability was issued by the U.S. Court of Appeals for the Ninth Circuit on November 19, 2010. The Order denying a Motion for Reconsideration of Denial of Certificate of Appealability was issued by the U.S. Court of Appeals for the Ninth Circuit on December 20, 2010. Petitioner timely seeks review of this denial under 28 U.S.C. § 2253, in accordance with the jurisdiction of this court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE
CONSTITUTIONAL PROVISIONS

Petitioner asserts a denial of his Sixth Amendment right to counsel, in so much as his trial counsel was "constitutionally ineffective." The

Sixth Amendment reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. U.S.Const. amend. 6

FEDERAL STATUATORY PROVISIONS

The underlying *habeas corpus* petition arises from an assertion of right under 28 U.S.C. § 2254(a), which reads as follows:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of *habeas corpus* in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

After applying for the petition in the district court, Petitioner was denied the requisite Certificate of

Appealability under 28 U.S.C. § 2253(c)(1)(A), which reads in pertinent part as follows:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -
> (A) the final order in a *habeas corpus* proceeding in which the detention complained of arises out of process issued by a State court... .



NEVADA STATE STATUTORY PROVISIONS

Nevada Revised Statute 174.035 relating to accepting guilty pleas from defendants that requires defendant to waive his or her right to appeal:

> (2) If a plea of guilty or guilty but mentally ill is made in a written plea agreement, the agreement must be in substantially the form prescribed in NRS 174.063..

Nevada Revised Statute 174.063 with language relating to waiver of appellate rights in all cases except jurisdiction issues or issues relating to the legality of the proceedings themselves:

> By entering my plea of guilty or guilty but mentally ill, I understand that I have waived the following rights and privileges:

6. The right to appeal the conviction, with the assistance of an attorney, either appointed or retained, unless the appeal is based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings and except as otherwise provided in subsection 3 of NRS 174.035.

STATEMENT OF THE CASE

Petitioner was initially charged by complaint with Lewdness with a Minor and two counts of Possession of Child Pornography. The Boulder City Police Department arrested Petitioner on August 30, 2004 based upon an arrest warrant issued August 24, 2004. On August 26, 2004, the Boulder City Police executed a search warrant at Petitioner's home and seized his computers among other items.

On August 24, 2004, an arrest warrant was issued for Petitioner. On August 25, 2004, the court issued a search warrant for Petitioner's home. When searched, the police seized two computers. A forensic search of the computers later turned up two images thought to be child pornography.

On August 30, 2004, Petitioner was arrested for Lewdness with a Minor. The State requested repeated continuances of the preliminary hearing over Petitioner's objections and motions to dismiss.

On Petitioner's motion, the District Court dismissed the complaint since the District Attorney's Office was not prepared to proceed with the preliminary hearing over a year after filing the Complaint.

Several months later on January 19, 2006, the state convened a Grand Jury which indicted Petitioner with seven counts of Lewdness with a Child under the Age of 14 and one count of Possession of Visual Presentation Depicting Sexual Conduct of Person under Sixteen Years of Age. On February 16, 2006, the court dismissed the indictment against Petitioner without prejudice for failure to notify counsel of grand jury proceedings.

A second grand jury indicted Petitioner on March 21, 2006 for four counts of Lewdness with a Child under the Age of 14 (Felony - NRS 201.230) and one count of Possession of Visual Presentation Depicting Sexual Conduct of Person under Sixteen Years of Age (Felony- NRS 200.700, NRS 200.730).

Petitioner was arraigned on the second indictment on March 29, 2006 at which time he entered "not guilty" pleas to all counts. Jury selection began November 14, 2006. On November 16, 2006, Petitioner entered a guilty plea to count 2: Lewdness with a Child under the Age of 14 (Felony- NRS 210.230) and Count 5- Possession of Visual Presentation Depicting Sexual Conduct of Person under Sixteen Years of Age (Felony- NRS 200.700, NRS 200.730).

On February 15, 2007, the court sentenced Petitioner to life in prison with eligibility for parole after 10 years for the lewdness count and 36 months in prison to run concurrent with the prior sentence for the child pornography count.

On June 8, 2007, Petitioner filed a proper person post conviction petition for a writ of *habeas corpus* in the Eighth Judicial District Court of Nevada. On October 27, 2007, following an evidentiary hearing, the district court denied the petition. (App.E, A-35, *infra*). Petitioner filed a notice of appeal on November 15, 2007 with the Nevada State Supreme Court. The Supreme Court affirmed the decision on July 8, 2008. (App.D, A-22, *infra*). On July 7, 2009, Petitioner filed a petition for a writ of *habeas corpus* with the United States District Court for Nevada. On July 13, 2009, the court issued a show cause order why the petition should not be dismissed as untimely.

Petitioner filed his response to the show cause order on August 12, 2009. In the opinion, the court dismissed the petition as untimely and denied a certificate of appealability. (App.B, A-2, *infra*). On June 17, 2010, Petitioner filed a notice of appeal with this Court which was construed as a request for a certificate of appealability. The Ninth Circuit denied that request on November 19, 2010. (App.A, A-1, *infra*). Petitioner filed a motion for reconsideration of the November 19, 2010 order denying a certificate of appealability. On December 20, 2010, the issued an order denying the motion for reconsideration. (App.G, A-60, *infra*).

ARGUMENT

Jurists of reason would find it debatable whether the district court was correct in its procedural ruling, when it denied as time-barred Robert J. Giesing's petition for *habeas corpus*, under the one-year limitation period of the Antiterrorism and Effective Death Penalty Act [28 U.S.C. § 2244(d)] in light of Ninth Circuit precedent in *Summers v. Schriro*, 481 F.3d 710 (9th Cir. 2007). *Summers* held that post-conviction proceedings are considered "direct review" proceedings for AEDPA purposes when the petitioner is barred from pursing a direct appeal due to a guilty plea thus not starting the AEDPA clock until after the time to pursue remedies in this Court has elapsed.

When entering his guilty plea, Petitioner was required to sign a document waiving his appellate rights for all but "reasonable constitutional jurisdiction or other grounds that challenge the legality of the proceeding." (App.F, A-55, *infra*). Unlike the wording strongly recommended in the statute, the plea agreement Petitioner signed did not separate constitutional and jurisdictional grounds so it read that he had to have constitutional jurisdictional grounds before being able to appeal.

Even if the document had been correct, Petitioner would still have been required to file a Petition for a Writ of *Habeas Corpus*. Petitioner had one claim he presented which was ineffective assistance of trial counsel. Due to the unique nature of an ineffective assistance of counsel claim which often requires

information not found in the record, the Nevada Supreme Court has repeatedly stated that they will usually reject a claim for ineffective assistance of counsel raised on direct appeal unless there has already been an evidentiary hearing on the matter. *Pellegrini v. State*, 117 Nev. 860, 34 P.3d 519 (2001).

Based upon the waiver of his appellate rights that was necessary to procure a plea agreement and the Nevada Supreme Court's repeated instructions to file an ineffective assistance of counsel claim as in a Petition for a Writ of *Habeas Corpus* instead of through direct review, Petitioner properly pursued the only effective avenue of direct review available. That avenue was a Petition for a Writ of *Habeas Corpus* which, understanding Ninth Circuit precedent based upon *Halbert v. Michigan*, 545 U.S. 605 (2005), declared that petitions filed where petitioners direct appeal was waived is considered "direct review".

As Petitioner's petition was, in the Ninth Circuit, one of direct review, the AEDPA clock should not have started until after the time ran for him to seek review of the Nevada Supreme Court decision affirming the denial of his writ. Thus, his time to file a federal Writ of *Habeas Corpus* did not expire until October 8, 2009 which was well beyond the actual filing date of July 7, 2009 making Petitioner's petition timely.

This Court has never directly decided the definition of direct review for purposes of a 28 U.S.C. 2254 *habeas* writ where the prisoner was required to

waive his right to appeal to accept a plea and therefore did not come up through the appellate system. The closest the Court has been to addressing the issue was in *Halbert v. Michigan*, 545 U.S. 605 (2005) where the Court held that prisoners who waive their right to direct appeal through entering a guilty plea are still entitled to counsel because the collateral review path functionally becomes one of direct review.

Due to the lack of instruction on this matter, the Circuits are in disarray and prisoners in different Circuits are receiving vastly differently results on the same or similar facts. Most states have statutes that explicit say that defendant who enters a guilty or no contest plea waives their right to appeal so this issue is not merely limited to Nevada or even the Ninth Circuit.

Robert Giesing was denied his Constitutional right to the effective assistance of counsel when his attorney failed to object to an illegal grand jury indictment based upon a violation of Nevada's law against using a grand jury to indict a defendant after the court has dismissed the case for failure to proceed in a timely manner without good cause. The law on the bar against further prosecution following a speedy trial dismissal is very clear in Nevada and Petitioner's attorney was not aware of it. *Maes v. Sheriff*, 86 Nev. 317, 468 P.2d 332 (1970) held:

> Although NRS 178.562(2) may not have been intended to bar a second criminal complaint in the circumstances before us,

> basic fairness does bar such a procedure. A new proceeding for the same offense (whether by complaint, indictment or information) is not allowable when the original proceeding has been dismissed due to the willful failure of the prosecutor to comply with important procedural rules. *Maes*, 86 Nev. at 319.

Unfortunately part of the record was missing at the time of Petitioner's state *habeas* hearing and for his review in the Nevada Supreme Court so they did not have concrete evidence, which he has since uncovered, showing the trial did indeed dismiss on *defense* motion. Those documents clearly establish ineffective assistance of counsel so Petitioner's Constitutional rights were egregiously violated and the federal District Court of Nevada ignored current law in dismissing Petitioner's petition giving the Ninth Circuit a basis upon which to grant the Certificate of Appealability.

A. Nevada Guilty Plea Requires Appeal Waiver

Under Nevada Revised Statute, a defendant pleading guilty is required to waive his appellate rights even if he has an appellate attorney unless "the appeal is based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings and except as otherwise provided in subsection 3 of NRS 174.035." NRS 174.063.

NRS 174.035 allows an exception for a negotiated, written deal with the prosecution allowing the defendant to appeal the denial of, and only of, pretrial motions the trial court denied. NRS 174.035.

However, Petitioner's plea form contained a small but significant difference from the suggested statutory waiver language. His form (App. F, A-55, *infra*) did not contain the comma between constitutional and jurisdiction so it read as though he could only challenge "constitutional jurisdictional" issues, not constitutional OR jurisdictional issues. His ineffective assistance of counsel issue was not jurisdictional so he proceeded with a Petition for a Writ of *Habeas Corpus*.

B. Nevada Will Only Entertain Ineffective Assistance of Counsel Arguments On Direct if an Evidentiary Hearing is Not Necessary

The Nevada Supreme Court has recognized the unique nature of constitutionally ineffective assistance of counsel claims by directing defendants to raise those claims in a *habeas* setting, not on direct appeal.

> [T]his court has consistently concluded that it will not entertain claims of ineffective assistance of counsel on direct appeal. *Gibbons v. State*, 97 Nev. 520, 634 P.2d 1214 (1981). *Corbin v. State*, 111 Nev. 378, 892 P.2d 580 (1995).

In 2001, the court revisited that philosophy with regards to whether a petitioner waived the issue of ineffective assistance of counsel if it was not raised on direct appeal. The court held that due to the policy of raising it on *habeas* review a petitioner did not waive the argument if they went up on direct review but did not raise it. *Pellegrini v. State*, 117 Nev. 869, 34 P.3d 519 (2001).

C. Ninth Circuit Held Where Petitioner Waives Direct Appeal With Guilty Plea, the Collateral Review Becomes Direct Review

Like Nevada, Arizona requires defendants to waive direct appellate review when entering a guilty plea as part of a plea bargain. Ariz.R.Crim.P. 17.1(e), N.R.S. 174.035. Also like Nevada, Arizona established an alternative system to direct appellate review. Ariz.R.Crim.P. 32; N.R.S. 34.370.

When reviewing Arizona's Rule 32 hearings through the lens of a petitiober who waived his right to direct appeal by taking a plea bargain and entering a guilty plea, the Ninth Circuit determined the Rule 32 hearing was a "direct review" proceeding. *Summers v. Schriro*, 481 F.3d 710 (9th Cir. 2007). However, this holding was limited to circumstances in which the petitioner was denied access to the appellate system through a waiver of rights and did not include defendants who had a full round of appellate review following a jury trial. *Hemmerle v. Schriro*, 495 F.3d 1069, 1074, fn.4 (9th Cir. 2007).

As the Rule 32 hearings were considered direct review, the AEDPA one-year time limit did not begin to run until a petitioner had an opportunity to seek a writ of review of that petition in the United States Supreme Court. *Summers*, 481 F.3d at 717; *Clay v. United States*, 537 U.S. 522, 527-529, and n. 3, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003) ("Direct review "under 28 U.S.C. 2244(d)(1)(A) includes review of a state conviction by the United States Supreme Court.)

In addition to the attributes of the Rule 32 hearing, the Ninth Circuit also relied on *Halbert v. Michigan*, 545 U.S. 605 (2005). In *Halbert*, the state had changed the rules for appeals by persons who pled guilty or no contest. The new rules required the petitioner to obtain leave from the court before being able to proceed and this also allowed judges to deny the appointment of counsel for these cases. *Halbert*, 545 U.S. at 609. Due to the complicated nature of a first tier appeal and that a reviewing court would have to look at the merits of the case to determine if the person should proceed, the Court held indigent petitioners were entitled to an attorney to help them with the first tier review. *Halbert*, 545 U.S. at 617.

> Whether formally categorized as the decision of an appeal or the disposal of a leave application, the Court of Appeals' ruling on a plea-convicted defendant's claims provides the first, and likely the only, direct review the defendant's conviction and sentence will receive. *Halbert*, 545 U.S. at 619.

In applying the holding of *Halbert* to *Summers*, the Ninth Circuit determined the procedure for plea-convicted defendants was a form of direct review.

> [T]he Supreme Court held in *Halbert v. Michigan*, 545 U.S. 605, 125 S.Ct. 2582, 162 L.Ed.2d 552 (2005), that a first-tier "of-right" review procedure available to a plea-convicted Michigan defendant in lieu of a conventional direct appeal is a form of "direct review" to which a constitutional right to counsel attaches under *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). *Halbert*, 545 U.S. at 619, 125 S.Ct. 2582. *Summers*, 481 F.3d 710, 713.

The procedure in Michigan was also very similar to Nevada's in that a trial court judge would likely provide the only close or direct review of a petition of a plea-convicted defendant. N.R.S. 34.390.

Based upon Nevada's requirement that Petitioner waive his appellate rights to plead guilty and the Nevada Supreme Court's decisions that it will not entertain arguments on direct review about ineffective assistance of counsel without a prior evidentiary hearing unless one is deemed unnecessary, although labeled as collateral review, the path taken was one of direct review. As a matter of direct review, the AEDPA clock did not begin until 90 days after the Nevada Supreme Court entered its judgment on July 8, 2008 against Petitioner. The one-year deadline to file did not expire until October

8, 2009 so Petitioner's federal writ of *habeas corpus* was timely.

The United States District Court for Nevada relied heavily on *Lawrence v. Florida*, 549 U.S. 327 (2007) in declaring Petitioner's petition untimely. (App. B, A-2, *infra*). However, the reliance on *Lawrence* is misplaced because the facts of the case revolve around a *habeas* petition that followed a full round of appellate review. After losing on the direct appellate review the petitioner sought relief through a federal *habeas* motion. In *Lawrence*, this Court held that petitioner was not entitled to statutory tolling of the Anti-Terrorism and Effective Death Penalty Act while seeking review in this Court of a state petition for a writ of *habeas corpus* . *Lawrence v. Florida*, 549 U.S. 327, 127 S.Ct. 1079 (2007).

Lawrence is not applicable to the case at bar because Lawrence was seeking collateral review *after* having the opportunity to seek direct review. Petitioner was barred by state law from seeking direct appellate review of his conviction because he entered a guilty and the basis for petitioner was one that Nevada would only review when presented in a writ of *habeas corpus*. As Petitioner was barred from seeking direct review, the holding in *Lawrence* is inapplicable because by denying Petitioner direct appellate review, Nevada used the *habeas* petition as direct review.

The Ninth Circuit in *Hemmerle* specifically said that the holding in *Summers* was not to be read so broadly as to include any post conviction relief. It

did not include petitions or procedures where the petitioner had already had full appellate review of their case. This sharp limitation on the holding already addresses any potential comparisons to *Lawrence* since *Lawrence* involved a petitioner who had already worked her way through the appellate system and lost. *Hemmerle v. Schriro*, 495 F.3d 1069, 1074, fn.4 (9th Cir. 2007), *Summers v. Schriro*, 481 F.3d 710 (9th Cir. 2007), *Lawrence v. Florida*, 549 U.S. 327 (2007). *Lawrence* did not contemplate a situation in which states bar direct review in favor of collateral review making its holding inapplicable. Therefore, the district court's reliance on *Lawrence* was misplaced and the court erred in dismissing Petitioner's petition as untimely.

D. Circuit Split On Direct Review Definition Already Recognized in *Summers*

In discussing whether to consider Arizona's rule 32 hearings collateral review or direct review, the Ninth Circuit looked to other Circuits for guidance. Instead of a single unifying answer, they found a split and went with the minority.

> The federal courts of appeals that have classified state law procedures for purposes of AEDPA have divided on the threshold question of whether such a classification [of a matter as collateral or direct review] presents a question of state or federal law. The Fourth, Tenth, and Eleventh Circuits have treated the classification as a question of state law. *Frasch v. Peguese*, 414 F.3d

> 518, 522 (4th Cir.2005); *Orange v. Calbone*, 318 F.3d 1167, 1170 (10th Cir.2003); *Bridges v. Johnson*, 284 F.3d 1201, 1202 (11th Cir.2002). These courts have concluded that "[i]n determining whether a particular state procedure constitutes part of the 'direct review' process for purposes of § 2244(d)(1)(A), a federal court must defer to underlying state court characterization of the procedure." *Orange*, 318 F.3d at 1170. By contrast, the Fifth and Sixth Circuits have held that classification, while heavily informed by state law, is ultimately a question of federal law. *Foreman v. Dretke*, 383 F.3d 336, 339 (5th Cir.2004); *Lopez v. Wilson*, 426 F.3d 339, 351 (6th Cir.2005) (en banc). *Summers*, 481 F.3d at 714.

The court in *Summers* went with the minority view that while the state law should influence the determination of whether a particular procedure is collateral or direct review, the federal system will make the ultimate determination without regard to the name actually used in the state. *Summers v. Schriro*, 481 F.3d 710 (9th Cir. 2007).

This is a question of great importance and the Circuits have not sorted out a uniform rule so this issue is ripe for the Court to step in and offer guidance.

CONCLUSION

Petitioner asserts that the procedure in question, treatment of collateral review as direct review when state law bars direct review due to a guilty plea, is specifically an issue this Court has not addressed and the various United States Courts of Appeals have treated inconsistently, even in respect to similar factual situations.

As such, a certificate of appealability should have been issued on the ground that reasonable jurists could have debated in their interpretations of this particular procedural issue and that the district court's findings were in direct conflict with established Ninth Circuit binding precedent in *Summers v. Schriro*, 481 F.3d 710 (9th Cir. 2007).

For the foregoing reasons, the petitioner, Robert J. Giesing respectfully requests that this Court instruct the Ninth Circuit Court of Appeals to issue a certificate of appealability so that full treatment of the denial of his constitutional rights may be presented.

Respectfully submitted,

SHANNON M. DORVALL
Imhoff & Associates, P.C.
12424 Wilshire Blvd., Ste. 770
Los Angeles, CA 90025
Telephone: (310) 315-1100
shannondorvall@criminalattorney.com

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[DATE STAMP]
FILED
NOV 19 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROBERT J. GIESING,
Petitioner - Appellant,

No. 10-16350
v. D.C. No. 2:09-cv-01221-GMN-PAL
District of Nevada, Las Vegas

BRIAN WILLIAMS, Sr.; et al.,
Respondents - Appellees.

ORDER

Before: TROTT and WARDLAW, Circuit Judges.

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2). All pending motions are denied as moot.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[DATE STAMP
ILLEGIBLE]

ROBERT J. GIESING,
Petitioner,

vs. 2:09-cv-01221-RCJ-PAL

BRIAN WILLIAMS, SR., *et al.*
Respondents.

ORDER

This represented habeas matter under 28 U.S.C. § 2254 comes before the Court on a *sua sponte* inquiry into whether, *inter alia,* the petition is time-barred because it was not filed within the one-year limitation period in 28 U.S.C. § 2244(d)(1). This order follows upon the Court's earlier show cause order (#3) and petitioner's response (#5) thereto.

Background

Petitioner Robert Giesing challenges his Nevada state conviction, pursuant to a guilty plea, of lewdness with a child under the age of fourteen and possession of a visual presentation depicting sexual conduct of a

person under sixteen years of age. The judgment of conviction was filed on March 1, 2007, and petitioner did not take a direct appeal.[1] The time for filing a direct appeal expired on or about Monday, April 2, 2007.

Petitioner mailed a *pro se* post-conviction petition to the state district court clerk for filing on or about June 1, 2007. The state district court denied relief, and the Supreme Court of Nevada affirmed the denial of relief on appeal. The remittitur issued on July 8, 2008.

Petitioner, through counsel, filed the federal petition on July 7,2009, one day short of exactly one year from the issuance of the remittitur.

Governing Law

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), in the context presented here, a federal habeas petition must be filed within one year after "the date on which the judgment [of conviction] became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Under Section 2244(d)(2), "[t]he time during which a properly filed application for State post-conviction or other collateral review with

---

[1]The judgment was signed as of February 21, 2007, and was stamped both as received and as filed on March 1, 2007. The *arguendo* March 19, 2007, filing date used in the prior order was based upon a misreading of the state court file-stamp.

respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection," 28 U.S.C. § 2244(d)(2). The limitation issue may be raised by the district court *sua sponte*. *Herbst v. Cook,* 260 F.3d 1039 (9th Cir. 2001).

The one-year limitation period additionally may be equitably tolled. Equitable tolling is appropriate only if the petitioner can show "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Lawrence v. Florida,* 549 U.S. 327, 336,127 S.Ct. 1079, 1085, 166 L.Ed.2d 924 (2007)(*quoting Pace,* 544 U.S. at 418, 125 S.Ct. at 1814). Equitable tolling is "unavailable in most cases," *Miles v. Prunty,* 187 F.3d 1104, 1107 (9th Cir.1999), and "the threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule," *Miranda v. Castro,* 292 F.3d 1063, 1066 (9th Cir.2002)(*quoting United States v. Marcello,* 212 F .3d 1005, 1010 (7th Cir. 2000)). The petitioner ultimately has the burden of proof on this "extraordinary exclusion." 292 F.3d at 1065. He accordingly must demonstrate a causal relationship between the extraordinary circumstance and the lateness of his filing. *E.g., Spitsyn v. Moore,* 345 F.3d 796, 799 (9th Cir. 2003). *Accord Bryant v. Arizona Attorney General,* 499 F.3d 1056, 1061 (9th Cir. 2007).

The Ninth Circuit has affirmed that intervening Supreme Court case law "is consistent with our sparing application of the doctrine of equitable tolling:"

> To apply the doctrine in "extraordinary circumstances" necessarily suggests the doctrine's rarity, and the requirement that extraordinary circumstances "stood in his way" suggests that *an external force must cause the untimeliness, rather than, as we have said, merely "oversight, miscalculation or negligence on [the petitioner's] part,* all of which would preclude the application of equitable tolling." Harris [v. Carter], 515 F.3d [1051,] ... 1055 [(9th Cir. 2008)].

Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th Cir. 2009)(emphasis added).

Discussion

In the present case, the federal limitation period, unless otherwise tolled, began running after the time expired for taking a direct appeal, *i.e.*, on April 2, 2007. A total of 59 untolled days elapsed before petitioner mailed his *pro* se state petition for filing on or about June 1, 2007. The statutory tolling under Section 2244(d)(2) resulting from the pendency of the state post-conviction proceedings continued through to the issuance of the remittitur on July 8, 2008. At that time, 306 untolled days remained in the one-year federal limitation period. Accordingly, unless otherwise tolled, the time period for filing a federal petition in this case would expire on Monday, May 11, 2009.

The federal petition was not filed, through counsel, until July 7, 2009, which was one day short of a year after the remittitur was filed and 57 days after the federal limitation period had expired, absent additional tolling.

In the unsworn response, as distinguished from the affidavits by counsel, petitioner's counsel maintains that "I believe we filed in time" because claims of ineffective assistance of counsel must be raised in Nevada in a state post-conviction petition and it therefore "seemed more appropriate to consider [petitioner's] method of post conviction relief as 'direct review.'"[2] Petitioner relies upon the Ninth Circuit's holding in *Summers v. Schriro* 481 F.3d 710 (9th Cir. 2007), that a Rule 32 hearing in Arizona constitutes the functional equivalent of a direct appeal. Petitioner contends that, in light of *Summers*, it "seems appropriate to apply the direct review standard of 28 U.S.C. § 2244(d)(1)(A) instead of [the] standard [for] post conviction relief under 28 U.S.C. § 2244(d)(2)."[3] Petitioner contends that the federal limitation period did not begin to run prior to the decision of the Supreme Court of Nevada on state post-conviction review. Petitioner further contends that the limitation period did not begin to run until after the expiration of the ninety day period for filing a petition for a writ of *certiorari* in the United States Supreme Court seeking review of the order affirming the denial of post-

---

[2] #5, at 4.

[3] *Id.*, at 5.

conviction relief.

The limitation analysis conducted by petitioner's counsel in this case was fundamentally flawed.

Under established law, as well as under a plain, common-sense reading of the statute, the date on which Giesing's conviction became final for purposes of Section 2244(d)(1)(A) was the date that the time expired for pursuing direct appellate review to the state supreme court. *See, e.g., Chaker v. Grogan*, 428 F.3d 1215, 1219 (9th Cir. 2005); *Smith v. Duncan*, 297 F.3d 809, 813 (9th Cir. 2002). The mere fact that claims of ineffective assistance of counsel generally may not be pursued on direct appeal does not make post-conviction review direct review.

Counsel's reliance upon the decision in *Summers v. Schriro* regarding the Rule 32 hearing procedure in Arizona was and is misplaced. In *Summers*, the Ninth Circuit held that the Rule 32 hearing procedure constituted direct review rather than collateral review because, in the procedural context presented, the procedure was available of right, with counsel, as the "functional equivalent of direct appeals," and *"'in lieu of direct appeal.'"* 481 F.3d at 715-16 (emphasis added)(quoting state court authorities). In the present Nevada context, in stark contrast, petitioner *had* a right to direct appeal *that he simply did not invoke within the thirty-day period for doing* so. His later state post-conviction petition was not a procedure provided by the State in lieu of a direct appeal; it simply was classic collateral review.

Summers clearly provides absolutely no support for the far more expansive proposition presented here that a state procedural rule that ineffective-assistance claims must be raised in a post-conviction petition makes post-conviction review direct review.

It further is well-established law that the running of the federal limitation period is stopped during the ninety-day time period for seeking *certiorari* only in connection with direct review, not also on collateral post-conviction review. *See, e.g., Lawrence*, 549 U.S. at 329-36, 127 S.Ct. at 1081-85.

Petitioner's counsel's federal limitation analysis in this case thus was contrary to established law, unsupported by apposite authority, and contrary to a plain and common sense reading of the governing statute.

Where, as here, petitioner's counsel miscalculates the federal limitation period, counsel's negligence or error does not constitute an extraordinary circumstance giving rise to equitable tolling. *See, e.g., Lawrence*, 549 U.S. at 336-37, 127 S.Ct. at 1085-86; *Miranda v. Castro*, 292 F.3d 1063, 1066-67 & n.4 (9th Cir. 2002).[4]

---

[4]The Court has taken the unsworn assertions by counsel in the show-cause response at face value and has assumed, *arguendo*, that the limitation analysis in the response was conducted prior to the filing of the federal petition as opposed to *post hoc* after the show-cause order. Either way, petitioner's counsel clearly proceeded on an erroneous assumption that the

In his remaining argument, petitioner seeks equitable tolling from April 28, 2009 (prior to the expiration of the limitation period, absent tolling, on May 11, 2009) through the federal filing date of July 7, 2009, based upon alleged difficulty in obtaining state court records and transcripts. Counsel alludes to efforts being made prior to April 28, 2009, to obtain the state court materials, but counsel acknowledges that "we do not have specific dates and therefore cannot provide sworn proof of those efforts." Petitioner expressly "thus do[es] not ask for tolling prior to that date."[5]

As backdrop, Giesing raises the following claims

---

federal one-year limitation period did not begin to run until after the Nevada Supreme Court's decision on state post-conviction review. The Court notes in this regard that the federal petition was filed one day short of exactly one year from the issuance of the remittitur on state post-conviction review.

[5]#5, at 10. The show-cause order expressly stated, in this represented case:

> ... Petitioner shall attach supporting affidavits, sworn declarations or documentary materials for all factual allegations asserted in the response. Unsupported factual assertions will be disregarded. If petitioner does not timely respond to this order or if petitioner does not assert facts sufficient to prevent the limitation period from running against him, the petition will be dismissed with prejudice as untimely.

#3, at 2. The Court notes that petitioner is represented by privately-secured rather than appointed counsel.

in the July 7,2009, federal petition. In Ground 1, he alleges that he was denied rights to a speedy trial and due process in violation of the Fifth, Sixth, and Fourteenth Amendments: (a) because of a 27 month delay between his arrest and trial; and (b) because he was indicted after the justice court dismissed a criminal complaint after the State did not proceed with a preliminary hearing. In Ground 2, he alleges that he was denied rights to due process, equal protection, and effective assistance of counsel in violation ofthe Fifth, Sixth and Fourteenth Amendments: (a) because trial counsel failed to move to dismiss the indictment based upon an alleged violation of his federal speedy trial rights and because the indictment allegedly was barred under state law after the dismissal of the complaint in the justice court; and (b) because trial counsel, *inter alia*, failed to properly handle a letter produced mid-trial, prior to the plea, that counsel allegedly mistakenly construed as an apology to the victims.

Petitioner's counsel attests in affidavits filed with the show cause response as follows. At some unspecified time, lead counsel in California reviewed the file received from petitioner, which included materials received from trial counsel. The file included transcripts from the grand jury proceedings, the change of plea, the sentencing, and the state postconviction evidentiary hearing. The file did not include trial transcripts (petitioner entered a plea mid-trial), transcripts from other hearings or minute orders from the justice court or state district court. At some unspecified time, California counsel asked her

assistant in California to contact the Nevada state district court to obtain further records and monitored her progress. On April 14, 2009, California counsel secured the assistance of Nevada counsel in Las Vegas to assist with obtaining further records. From April 21, 2009, through June 11, 2009, Nevada and/or California counsel thereafter attempted to obtain additional records and transcripts by contacting or attempting to contact the state district court clerk, the justice court clerk, and a number of court reporters. On May 6, 2009, the justice court clerk faxed a copy of minutes that counsel describes as "far from accurate minutes and very uninformative." On June 5, 2009, counsel received unspecified records from the state district court that counsel states "did not contain most of the transcripts that were needed or a complete record."[6]

Counsel filed the federal petition on July 7, 2009. The Court issued a show cause order as to the timeliness of the petition on July 13, 2009. According to the affidavits presented, after receiving the show cause order, California counsel made arrangements to travel to Nevada on the case. On July 30, 2009, counsel flew to Las Vegas and drove to Boulder City to personally inspect the court records. Counsel attests that, at that time, "[a]t long last ... we found the information that was missing from the District Court files and which we had previously been told was not in the file, namely the Order dismissing the Complaint

---

[6]Affidavits of Shannon Dorvall and Maysoun Fletcher, filed with #5, at electronic docket pages 43-49.

against Mr. Giesing on Defense Motion." Counsel asserts that "[w]e also found a Minute Orders [sic] from previous appearances."[7]

In the show cause response, counsel asserts that, as of the time of the July 7, 2009, filing of the petition, *"[b]elieving the deadline fast approaching,* we decided to file the petition with what information we had and that we would continue to diligently try to find the rest of the file and obtain the transcripts from Boulder City."[8] Counsel urges that because more than notice pleading is required in federal habeas counsel sought "[t]o provide support to the allegations and file the strongest possible petition so as to avoid summary dismissal."[9] Counsel maintains that "[t]he allegation against another attorney of providing constitutionally ineffective assistance of counsel is very serious and should never be casually raised." Counsel asserts that "[t]o that end, we wanted to be certain we had proper proof before making such an accusation and diligently worked to find evidence *in addition to the trial attorney's own statements.*"[10]

Petitioner has failed to demonstrate a viable basis for equitable tolling. At bottom, petitioner

---

[7] *Id.*

[8] #5, at 4 (emphasis added).

[9] *Id.*, at 2 & 7.

[10] #5, at 6-7 (emphasis added).

contends that he is entitled to equitable tolling because his counsel – after having the case for an unspecified period of time – was unable to quickly obtain copies of all state court records relating to his claims that were based upon the delay prior to trial and the dismissal of the justice court complaint, after counsel made inquiry 20 days or less prior to the expiration of the federal limitation period. Any such last-minute difficulty in obtaining all possibly related documents clearly did not cause the late filing of the federal petition. *Inter alia*, counsel ultimately filed the federal petition on July 7, 2009, without the records in question, in the erroneous belief that the deadline was "fast approaching." Counsel was mistaken, however, as the deadline already had passed by that time. It was counsel's error and miscalculation of the limitation period, not an incomplete file, that caused the late filing.

Petitioner – proceeding *pro* se and without the additional materials obtained by counsel on July 30, 2009 – presented detailed claims in the state post-conviction petition challenging his conviction based upon the delay prior to trial and the dismissal of the justice court complaint.[11] In the state post-conviction evidentiary hearing transcript, which federal habeas counsel had from the outset, petitioner's claims based upon the delays prior to trial and the circumstances surrounding the dismissal of the justice court

---

[11]See State Court Post-Conviction Petition, filed with #5, at electronic docket pages 36-37 & 40.

complaint were discussed.[12]

Counsel attaches with the show cause response a copy of the justice court order dismissing the complaint on a defense motion that federal habeas counsel "at long last" located on July 30, 2009. The order in question is a one-line form check-off order that says in pertinent part "[c]ase dismissed by motion of Defendant/Defense Attorney." See #5, at electronic docketing page 22. This very same fact – that the complaint was dismissed on a defense motion – already was established by the evidentiary hearing transcript and was not contested. Indisputably, a last-minute inability to locate this one-line order establishing an already-known procedural fact did not constitute an extraordinary circumstance standing in the way of petitioner filing a timely federal petition.

In *Waldron-Ramsey*, the Ninth Circuit addressed a similar claim of equitable tolling by a petitioner proceeding *pro se*. The petitioner in that case argued that he was entitled to equitable tolling because he did not have full access to his legal materials and because "he believed that he was required to file a thorough habeas brief explicating all of his claims in full and would not be able to amend his petition at a later date." 556 F.3d at 1013 & n.4. The Ninth Circuit rejected this argument on, *inter alia*, the following grounds:

---

[12]See #1-6, at 5-13.

> Moreover, even if Waldron-Ramsey may have faced some difficulty developing his claims without constant possession of all of his records, he has not adequately explained why he filed 340 days after his AEDPA deadline. If diligent, he could have prepared a basic form habeas petition and filed it to satisfy the AEDPA deadline, or at least could have filed it less than 340 days late assuming that some lateness could have been excused. From 1994 to 1997 he had access to all of the documents necessary for his *Faretta* self-representation claim. He could have developed that argument, outlined the other arguments and the facts underlying those arguments on the form habeas petition, and then sought to amend his petition when he got more information. We conclude that Waldron-Ramsey did not exercise due diligence and that his argument regarding access to legal materials lacks merit. Therefore, equitable tolling is inappropriate.

556 F.3d at 1014.[13]

---

[13] *See* also *Ford v Pliler* 590 F.3d 782, 790 (9th Cir. 2009), *petition for cert. filed*, _ U.S.LW._ (U.S. Mar. 29, 2010) (No. 09-9957) (prior counsel's alleged failure to provide complete legal file could not be the cause of the untimely filing of the federal petition because the petitioner already was aware of the factual basis of the claim, and he did not need the materials to file a timely

Here, too, the represented petitioner has not come forward with facts demonstrating the requisite diligence. Nothing prevented the represented petitioner from filing the petition that was filed untimely on July 7, 2009, instead as a timely filing on or before May 11, 2009. Petitioner obtained no critical piece of information between May 11, 2009, and July 7, 2009, that was not already known prior to the expiration of the federal limitation period. The actual copy of the one-line order later obtained on July 30, 2009, clearly was not such a critical, outcome-determinative piece of information that was not already known during the limitation period. As in *Waldron-Ramsey*, the only diligent, prudent and competent course, particularly by a represented party, would have been to file a timely petition and then to seek to amend if and as necessary upon the discovery of additional *material* information. Even though federal habeas pleading unquestionably is not notice pleading, this Court cannot, and does not, dismiss a federal habeas petition for lack of specificity without an opportunity to amend. Delaying filing until after the expiration of the limitation period, where nothing stood in the way of a timely filing, in order to seek additional record materials relating to a claim clearly would not demonstrate either diligent or prudent pursuit of the petitioner's rights.

The disposition of the present case thus comes back to the point that the cause of the late filing was

---

habeas petition).

not the last-minute unavailability of additional records but instead was federal habeas counsel's mistaken belief that the deadline was "approaching" rather than already past on July 7, 2009. Under established law, an extraordinary circumstance must cause the untimeliness rather than oversight, miscalculation or negligence by the petitioner or his counsel. *See, e.g., Waldron-Ramsey, supra.* Petitioner accordingly has not demonstrated a viable basis for equitable tolling in this case, and the petition therefore is untimely.[14]

Consideration of Possible Issuance of a Certificate of Appealability

Under Rule 11 of the Rules Governing Section 2254 Cases, the district court must issue or deny a certificate of appealability when it enters a final order adverse to the petitioner. A district court order granting or denying a certificate of appealability does not eliminate the requirement of filing a timely notice of appeal. A motion to reconsider the order regarding a certificate of appealability does not extend the time to appeal.

---

[14]The Court does not find that an evidentiary hearing is warranted. The record has been sufficiently developed, following a show-cause notice to the represented party and an opportunity to present relevant evidence, to allow a full evaluation of petitioner's equitable tolling argument. Holding an evidentiary hearing on the same facts would not offer a reasonable chance of altering the outcome. *See, e.g., Williams v. Woodford*, 384 F.3d 567, 591 (9th Cir. 2004); *Tapia v. Roe*, 189 F.3d 1052, 1056 (9th Cir. 1999).

As to claims rejected on procedural grounds, the petitioner must show: (1) that jurists of reason would find it debatable whether the petition stated a valid claim of a denial of a constitutional right; and (2) that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484,120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000). While both showings must be made to obtain a certificate of appealability, "a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." 529 U.S. at 485,120 S.Ct. at 1604. Where a plain procedural bar is properly invoked, an appeal is not warranted. 529 U.S. at 484,120 S.Ct. at 1604.

For the reasons discussed above, jurists of reason would not find the dismissal of the petition as untimely to be debatable or wrong. At bottom, federal habeas counsel's miscalculation of the federal limitation period, rather than any other circumstance, was the cause of the untimely filing of the federal petition.

IT THEREFORE IS ORDERED that the petition shall be DISMISSED with prejudice as time-barred.

IT FURTHER IS ORDERED that a certificate of appealability is DENIED.

The Clerk of Court shall enter final judgment

accordingly, in favor of respondents and against petitioner, dismissing this action with prejudice.

DATED: This 9th day of June, 2010.

/s/
ROBERT C. JONES
United States District Judge

APPENDIX C

IN THE SUPREME COURT OF
THE STATE OF NEVADA

[DATE STAMP]
RECEIVED
JUL 10 2008
CLERK OF THE COURT

[DATE STAMP]
FILED
2008 JUL 11 P 2:59
/s/
CLERK OF THE COURT

ROBERT J. GIESING,
Appellant,

vs.

Supreme Court No. 50553
District Court Case No. C220617

THE STATE OF NEVADA,
Respondent.

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as

follows: "ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 9th day of June, 2008.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 8th day of July, 2008.

Tracie Lindeman, Supreme Court Clerk

By: /s/
Deputy Clerk

[NEVADA STATE SEAL]

APPENDIX D

IN THE SUPREME COURT OF
THE STATE OF NEVADA

[DATE STAMP]
FILED
JUN 09 2008
TRACIE K. LINDEMAN
CLERK OF THE SUPREME COURT
By /s/
DEPUTY CLERK

[DATE STAMP]
RECEIVED
JUL 10 2008
CLERK OF THE COURT

ROBERT J. GIESING,
Appellant,

vs. No. 50553

THE STATE OF NEVADA,
Respondent.

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On March 1, 2007, the district court convicted appellant, pursuant to a guilty plea, of one count of lewdness with a child under the age of 14 and one count of possession of visual presentation depicting sexual conduct of a person under the age of 16 (child pornography count). The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole on the lewdness count and a concurrent term of 12 to 36 months on the child pornography count. No direct appeal was taken.

On June 8, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition, and appellant filed a reply. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. On October 24, 2007, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that his guilty plea was not entered voluntarily and knowingly. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.[1] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[2] In determining the validity of a guilty

---

[1]*Bryant v. State*, 102 Nev. 268, 721 P.2d 364 (1986); *see also Hubbard v. State*, 110 Nev. 671, 877 P.2d 519 (1994).

[2]*Hubbard*, 110 Nev. at 675, 877 P.2d at 521.

plea, this court looks to the totality of the circumstances.[3]

First, appellant claimed that his plea was not valid because he was not competent to enter a guilty plea. Appellant claimed that he was in shock when he entered his guilty plea because his trial counsel told him that he knew appellant was innocent but that he could not get a fair trial and would be found guilty. Appellant failed to carry his burden of demonstrating that his plea was invalid in this regard. The record on appeal does not support appellant's claim that he was incompetent at the time he entered his plea. This court has held that the test for determining competency is "'whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding–and whether he has a rational as well as factual understanding of the proceedings against him.'"[4] A claim that appellant was in "shock" fell far short of demonstrating that appellant did not have the ability to consult with his attorney with a reasonable degree of rational understanding and that he did not have a rational and factual understanding of the proceedings against him. Further, trial counsel testified at the evidentiary hearing that he did not tell appellant that he knew that appellant was innocent and that he believed appellant understood the guilty

---

[3]*State v. Freese*, 116 Nev. 1097, 13 P.3d 442 (2000); *Bryant*, 102 Nev. 268, 721 P.2d 364.

[4]*Melchor-Gloria v. State*, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (quoting Dusky v. United States, 362 U.S. 402 (1960)).

plea agreement. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his guilty plea was invalid because he did not have time to read and understand the plea agreement before signing it. He claimed that he had less than 5 minutes after he was brought the plea agreement. Appellant failed to carry his burden of demonstrating that his plea was invalid in this regard. Appellant's trial counsel testified at the evidentiary hearing that appellant was under somewhat of a time constraint because the plea offer was being considered four days into the jury trial, but that trial counsel went over the guilty plea agreement with appellant and appellant appeared to understand. Appellant's trial counsel further testified that appellant was not rushed into entry of the plea and that there was a period of one to one and one-half hours between the time they began to discuss negotiations and the time that the plea was entered. During the guilty plea canvass, appellant affirmatively indicated that he had read, signed and understood the guilty plea agreement and that he had no questions. Therefore, we conclude the district court did not err in denying this claim.

Third, appellant claimed his guilty plea was invalid because there was an insufficient factual basis for the lewdness count. Appellant claimed that wrestling with his nephew and accidentally touching his nephew's genitals did not amount to lewdness. Appellant claimed that the State improperly added the phrase "with the intent of arousing sexual desires."

Appellant appeared to also attack alleged inconsistencies in the victim's testimony. Appellant further appeared to attack his guilty plea to count 2 when he believed his conduct better fit into either counts 3 or 4. Appellant failed to carry his burden of demonstrating that his guilty plea was invalid in this regard. Appellant's guilty plea to the charge of lewdness with a child under the age of 14 relieved the State of its obligation of proving the elements of the charged crimes with proof beyond a reasonable doubt. Appellant made a factual admission during the guilty plea canvass that he had "touched his nephew's penis during wrestling with the intent of sexual gratification."[5] Appellant received a substantial benefit by entry of his guilty plea as he avoided a conviction on three additional counts of lewdness with a child. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his guilty plea was invalid because the district attorney did not turn over evidence in a timely manner to allow the defense to examine it. Appellant claimed that the district

---

[5]In the indictment, count 2 stated that appellant

> did then and there willfully, lewdly, unlawfully, and feloniously commit a lewd or lascivious act with the body of [the victim], a child under the age of fourteen years, by touching the penis and/or scrotum of the [victim] with his hand, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of said Defendant, or said child.

attorney did not allow a timely examination of the hard drive of his computer in order to show that appellant's family was responsible for "hacking" into the system and downloading the image of child pornography. Appellant failed to carry his burden of demonstrating that his guilty plea was invalid in this regard. First, we note that trial counsel successfully litigated a motion to sever the child pornography count from the lewdness counts. The lewdness counts went to trial first and it was during this trial that appellant accepted the plea negotiations. Thus, appellant failed to demonstrate that he did not have sufficient time to have the computer hard drive examined. Moreover, appellant's trial counsel testified at the evidentiary hearing that the computer hard drive was examined but that he recalled it was not possible for the expert to conclusively testify that the computer hard drive had been accessed by someone other than appellant. Appellant failed to demonstrate that earlier access to the computer would have had a reasonable probability of altering his decision to enter a guilty plea. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that he received ineffective assistance of counsel.[6] To state a claim of

---

[6]To the extent that appellant raised any of the underlying claims independently from his ineffective assistance of counsel claims, those claims fell outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. *See* NRS 34.810(1)(a).

ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness. and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.[7] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[8] A petitioner must prove the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[9]

First, appellant claimed that his trial counsel had failed to explain the nature of the guilty plea, including the potential sentence and the right to appeal. Appellant asserted that his trial counsel informed him that he knew appellant was innocent and that appellant would get probation. Appellant further asserted that his trial counsel did not tell him that he could get any other sentence than probation or

---

[7] *Hill v. Lockhart*, 474 U.S. 52 (1985); *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (1996).

[8] *Strickland v. Washington*, 466 U.S. 668, 697 (1984).

[9] *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

that he was giving up the right to appeal or any constitutional rights. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The written guilty plea informed appellant of the elements of the crimes, the potential sentence, the waiver of constitutional rights, and the limited right to appeal from a judgment of conviction based upon a guilty plea. During the guilty plea canvass, appellant affirmatively acknowledged that he had read, signed and understood the guilty plea agreement. Appellant's trial counsel testified during the evidentiary hearing that he had discussed the guilty plea agreement with appellant, the sentencing ranges, and the right to appeal. Appellant's trial counsel further testified that he had not told appellant that he was innocent and he did not promise appellant probation. Appellant's trial counsel testified that he believed a guilty plea was in appellant's best interests as he avoided the possibility of being convicted of three additional counts of lewdness with a child, which carried potential penalties of life imprisonment. Appellant's trial counsel further testified that the defense theory, that the victim. (appellant's nephew) and the four prior bad act witnesses (appellant's nephews), were lying and in a familial conspiracy, was seriously undermined when a letter surfaced during trial.[10] Therefore, we conclude

---

[10]Appellant's trial counsel testified that during the trial the district attorney received and turned over a copy of a letter that appellant had written to his brother and a therapist apologizing to the victim and any hurt he had caused the victim in the instant case and the prior bad act witnesses.

that the district court did not err in denying these claims.

Second, during the evidentiary hearing, appellant claimed that his trial counsel was ineffective for failing to challenge the 19-month delay between the time of his a arrest and the second grand jury indictment. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel testified that he did not believe that a motion to dismiss based on delay would have been successful, and appellant failed to demonstrate in his written pleadings or at the evidentiary hearing that such a motion had a reasonable probability of success. Therefore, we conclude that the district court did not err in denying this claim.

Finally, appellant claimed: (1) the district attorney in the grand jury and indictment process violated his due process rights by withholding witness credibility information, asking leading questions, making incriminating statements against the accused without any evidence, presenting an indictment where the alleged acts did not violate the law, presenting evidence illegally obtained, and presenting charges when a previous grand jury rejected one of the charges and when there was no factual support; (2) the testimony of the victim did not support the proposed indictment and the indictment did not detail each element of the charges; (3) the lewdness statute was vague and did not inform a reasonable person of what conduct constituted lewdness; (4) his sentence was

cruel and unusual punishment because his conduct amounted only to accidental touching of private parts for a few seconds; (5) his due process rights were violated because the alleged actions did not justify the charges; (6) he was subject to an unreasonable search and seizure; (7) the district court erred in denying his motion to suppress evidence; (8) the district court erred in denying the motion to dismiss the child pornography charge; (9) the district court erred in denying his motion to have an independent psychological examination of the victim; and (10) the district court erred in denying a motion for continuance when the district attorney had not turned over critical evidence. These claims fell outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea.[11] At the evidentiary hearing, the district court rejected appellant's attempt to incorporate these claims into his grounds for ineffective assistance of counsel. Because appellant offered no more than a statement that he wished to incorporate the grounds and provided no cogent analysis or argument of what errors were committed by trial counsel regarding these claims and how these alleged errors made a difference to the outcome of the proceedings, we conclude that the district court did not abuse its discretion in rejecting appellant's attempt to incorporate these claims into his grounds for ineffective assistance of counsel.[12]

---

[11]*See* NRS 34.810(1)(a).

[12]*See generally* NRS 34.750(5).

Therefore, we conclude that the district court did not err in denying these claims.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[13] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

/s/_____, J.
Hardesty

/s/_____, J.
Parraguirre

/s/_____, J.
Douglas

cc: Hon. Donald M. Mosley, District Judge
Robert J. Giesing
Attorney General Catherine Cortez Masto/
Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

[NEVADA STATE SEAL]

---

[13]*See Luckett v. Warden*, 91 Nev. 681, 682, 541P.2d 910, 911 (1975).

IN THE SUPREME COURT OF
THE STATE OF NEVADA

ROBERT J. GIESING,
Appellant,

vs. Supreme Court No. 50553
District Court Case No. C220617

THE STATE OF NEVADA,
Respondent.

REMITTITUR

TO: Charles J. Short, Clark District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: July 8, 2008

Tracie Lindeman, Clerk of Court

By: /s/_____
Deputy Clerk

cc (without enclosures):

Hon. Donald M. Mosley, District Judge
Attorney General Catherine Cortez Masto/
Carson City

Clark County District Attorney David J. Roger
Robert J. Giesing

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on JUL 11 2008.

/s/
District Court Clerk

APPENDIX E

ORDR
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
H.L. SIMON
Chief Deputy District Attorney
Nevada Bar #000411
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

[DATE STAMP]
FILED
Oct 24 9 54 AM '07
/s/
CLERK OF THE COURT

THE STATE OF NEVADA,
Plaintiff,

-vs-

CASE NO: C220617
DEPT NO: XIV

ROBERT GEISING
#95658
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: October 5, 2007
TIME OF HEARING: 9:00 A.M.

THIS CAUSE having come on for hearing before the Honorable Judge Donald Mosley, District Judge, on October 5, 2007, the Petitioner Being present, Proceeding In Forma Pauperis, the Respondent being represented by DAVID ROGER, District Attorney, by and through H. LEON SIMON, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, the testimony of witnesses, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On March 22, 2006, Robert Geising (hereinafter "Defendant") was charged via Grand Jury Indictment with Counts 1 through 4 – Lewdness with a Child Under the Age of 14 (Felony - NRS 201.230) and Count 5 – Possession of Visual Presentation Depicting Sexual Conduct of a Person Under Sixteen Years of Age (Felony - NRS 200.700, 200.730).

2. Defendant's" trial began on November 13, 2006. On November 16,2006, Defendant entered a negotiated guilty plea to Count 2 and Count 5 of the indictment - Lewdness with a Child Under

the Age of 14 and Possession of Visual Presentation Depicting Sexual Conduct of a Person Under Sixteen Years of Age respectively.

3. On February 13, 2007, as to Count 2, Defendant was sentenced to life in prison with the possibility of parole beginning at ten (10) years. As to Count 5, Defendant was sentenced to a minimum term of not less than one (1) year and a maximum term of not more than six (6) years. The two sentences were ordered to run concurrently. On March 1, 2007, a Judgment of Conviction was entered.

4. On June 28, 2007, Defendant filed a Petition for Writ of Habeas Corpus.

5. On July 17, 2007, the State filed their opposition.

6. An evidentiary hearing was held on October 4, 2007 addressing Petitioner's issues in his writ.

7. Jeffrey Posin, Mark Roach, and Jennifer Wensink were Defendant's trial counsel.

8. Jeffrey Posin, Defendant's trial counsel, was present at the evidentiary hearing and testified to the following:

   a. He does not remember the State purposefully delaying the Defendant't trial, and even if there was a delay, it

was not prejudicial.

b. He does not recall the prosecutor asking any leading questions, and if these type of questions were asked, they were not significant.

c. He does not remember the State making any incriminating statements against the accused during the grand jury proceeding.

d. Defense counsel did make a motion to get Defendant's computer back, as it has been seized by the police, however, that motion was denied.

e. Mr Posin testified that he spoke to the Defendant in detail about the plea offer and thoroughly explained everything; He did not believe the Defendant was rushed into making the decision. However, the Judge did tell them that he didn't want to keep the jury waiting too long. Mr. Posin believes the Defendant pled knowingly, voluntarily, and intelligently.

f. Mr. Posin believed then and still believes now that the plea was the best option for the Defendant. At trial the Court ruled that evidence of Defendant's prior bad acts could come in and that was devastating to the Defendant's case. New

evidence, a letter from the Defendant apologizing for his molestation of his four nephews also damaged Defendant's case. Defense counsel believed that there was a greater chance of leniency if the Defendant chose to plead guilty. If not, he would be facing a possibility of four life sentences with the possibility of parole after ten years on each count.

g. Mr. Posin never promised the Defendant probation.

h. The jurors did tell Defense counsel that while they didn't believe the victim in this trial, after the letter came in illustrating that he had molested four of his nephews in California, they wanted to convict him.

I. Defense counsel made a motion for a psychological examination of a minor, but it was denied by the Court. The Court noted that the Defendant had no right to have a psychological examination done on the minor/victim.

j. Defense counsel filed a 30 page pre-sentencing memorandum trying to get leniency for the Defendant.

9. Ms. Wensink and Mr. Roach also testified and both stated that they did not promise the

Defendant probation. They both also stated that they believe the Defendant entered his guilty plea knowingly, voluntarily, and intelligently.

10. Neither Ms. Wensink nor Mr. Roach never heard anybody tell the Defendant that he had to hurry and make a decision in regards to the plea.

11. In as much as Defendant claims that he was promised probation. Defendant's' Guilty Plea Agreement states:

    a. I understand as a consequence of my guilty plea to Count 2, the Court must sentence me to imprisonment in the Nevada Department of Corrections for life with the possibility of parole at 10 years (120) months.

    b. I understand that as a consequence of my plea of guilty as to Count 5, the Court must sentence me to imprisonment in the Nevada Department of Corrections for a minimum term of not less than one (1) year and a maximum term of not more than six (6) years.

    c. I have not been promised or guaranteed any particular sentence by anyone. I know that my sentence is to be determined by the Court within the limits prescribed by statute. (GPA, pp. 2-3)

12. Given the numerous times Defendant was advised that probation and sentencing was to be determined only by the Court, Defendant's claim that he was promised probation is belied by the record.

13. Defendant's claim that he was in "shock" and, therefore, was not competent to sign the plea is a bare allegation unsupported by any evidence.

14. In as much as Defendant claims that the indictment does not detail each element of the charges. Defendant's Guilty Plea Agreement signed and filed in open court on November 16, 2006, states: "I understand that by pleading guilty I admit the facts which support all the elements of the offense(s) to which I now plead as set forth in Exhibit "1". (GPA, pp. 1) Exhibit "1" is the indictment that Defendant is now claiming was not detailed enough.

15. In as much as Defendant is claiming that his guilty plea was not entered into knowingly, intelligently, and voluntarily his GPA states: "I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me ... I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest. I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under the duress

or coercion or by virtue of any promises ofleniency, except for those set forth in this agreement. (GPA, pp. 5)

16. The statute that Defendant was convicted under has been approved by the Nevada Legislature and did not violate the Defendant's Constitutional rights.

17. In as much as Defendant is claiming that his punishment is cruel and unusual, as aforementioned above, in his GPA the Defendant stated: "I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest." (GPA, pp. 5)

18. Defendant's claim that he was the victim of an unreasonable search and seizure is a bare allegation, Defendant has not offered any evidence as to why this search and seizure was unreasonable or unlawful.

19. Defendant's claim that he suffered from ineffective assistance of counsel is a bare allegation. He has failed to show how his counsel was ineffective, and even if they were, he has failed to show how he was prejudiced.

20. Defendant has failed to show that his Constitutional rights were violated by tactics and statements made by the State.

21. Given the strong evidence that Defendant entered his guilty plea with the advice of counsel and knowing the consequences thereof, Defendant has failed to meet his burden of proving that his guilty plea is invalid.

22. The Statute Defendant was convicted under is Constitutional.

23. Defendant's sentence is not cruel and unusual.

24. The Trial Court appropriately used it's discretion when granting and denying all motions.

25. Defense counsel were not ineffective.

CONCLUSIONS OF LAW

1. Defendant's claims that the indictment and grand jury proceedings were defective, the applicable statute is void for vagueness, he suffered cruel and unusual punishment, he was denied a speedy trial, his actions did not justify the charge, he was illegally searched, and the court erroneously denied his motion are all barred by NRS 34.810. The court shall dismiss a petition if "[t]he petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel." NRS

34.810(1)(a); *see also Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds by *Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999).

2. "[W]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Kirksey v. State*, 112 Nev. 980, 999, 923 P.2d 1102, 1114 (1997) (citations omitted).

3. A motion to withdraw a plea of guilty may be made only before sentence is imposed, but: "[t]o correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." See NRS 176.165; *Baal v. State*, 106 Nev. 69, 72, 787 P.2d 391, 394 (1990). Three important factors in making the determination of the presence of a "manifest injustice" are whether the defendant: 1) acted voluntarily; 2) understood the nature of the charges against him; and 3) understood the consequences of his plea. *Wilson v. State*, 99.Nev. 362,373, 664 P.2d 328, 334 (1983).

4. The law in Nevada clearly establishes that a plea of guilty is presumptively valid and the burden is on a defendant to show that the plea was not voluntarily entered. *Bryant*, 102 Nev.

272, 721 P.2d 364 (1986); *Wingfield v. State*, 91 Nev. 336, 337, 535 P.2d 1295, 1295 (1975). Further, a guilty plea should not be invalidated "as long as the totality of the circumstances, as shown by the record, demonstrates that the plea was knowingly and voluntarily made and that the defendant understood the nature of the offense and theconsequences of the plea." *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000). The Nevada Supreme Court makes it clear in the case of *Heffley v. Warden*, 89 Nev. 573, 575, 516 P.2d 1403, 1404 (1973), that the guidelines for voluntariness of pleas of guilty "do not require the articulation of talismanic phrases. It [the court] requires only 'that the record affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily.'" *Brady v. United States*, 397 U.S. 742, 747-748, 90 S.Ct. 1463, 1470 (1970); *United States v. Sherman*, 474 F.2d 303 (9th Cir. 1973).

5. In *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), the Nevada Supreme Court held that claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. *Id.* Furthermore, a defendant is not entitled to relief because of a subjective expectation of a lesser, or different, sentence than he actually

received. *Lundy v. Warden*, 89 Nev. 419, 514 P.2d 212 (1973).

6. The test for ineffective assistance of counsel is governed by the United States Supreme Court decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

7. Under *Strickland*, defendants must prove that they were denied "effective assistance of counsel" by satisfying a two-prong test. *Id.* at 686-687, 104 S.Ct. at 2063-2064. Under this test, a defendant must show that "counsel's performance was deficient" and, second, that the "deficient performance prejudiced the defense." *Id.* at 687, 104 S.Ct. at 2064. In order to satisfy the first prong, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. at 2064. The second prong requires a defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. *See also State v. Love*, 109 Nev. 1136, 865 P.2d 322 (1993).

8. In order to show prejudice, the defendant here must establish by a "probability sufficient to undermine confidence in the outcome" that the "outcome of the proceeding would have been different." *McNelton v. State*, 15 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), *citing Strickland*.

466 U.S. at 687-689, 694, 104 S.Ct. at 2064-2065, 2068.

9. Finally, the reviewing court "need not consider both prongs of the test if the defendant makes an insufficient showing on either one." *Molina v. State*, 120 Nev. Adv. Op. 21, 87 P.3d 533, 537 (2004).

10. The *Strickland* test for effectiveness of assistance of counsel was adopted by the Nevada Supreme Court in *Warden, Nev. State Prison v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984).

11. In considering the first prong of the Strickland test, the court should inquire as to whether trial counsel made a "sufficient inquiry into the information that is pertinent to his client's case." *Doleman v. State*, 112 Nev. 843,848,921 P.2d 278,280 (1996), *citing Strickland*, 466 U.S. at 690-691, 104 S.Ct. 2066.

12. Strategy or decisions regarding the conduct of defendant's case are "'virtually unchallengeable absent extraordinary circumstances.'" *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996) *(quoting Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990)). The Court has also held that there is a presumption that trial counsel was effective and fully discharged his duties. *Hornick v. State*, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996) *(citing Davis v. State*,

107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991)).

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Defendant's Petition for a Post-Conviction Writ of Habeas Corpus shall be, and it is, hereby denied.

DATED this 19th day of October, 2007.

JOSEPH T. BONAVENTURE
DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY /s/
H. Leon Simon
for Chief Deputy District Attorney
Nevada Bar #000411

APPENDIX F

GMEM
DAVID ROGER
DISTRICT
ATTORNEY
Nevada Bar #002781
ERIC JORGENSON
Chief Deputy
District Attorney
Nevada Bar #001802
200 Lewis Avenue
Las Vegas, NV 89155-
2212
(702)671-2500
Attorney for Plaintiff

[DATE STAMP]
FILED IN OPEN COURT
11-16-06
SHIRLEY B.
PARRAGUIRRE, CLERK
/s/
LINDA SKINNER, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF
NEVADA,
Plaintiff,

-vs-

ROBERT JOSEPH
GIESING,
#1340222
Defendant.

GUILTY PLEA AGREEMENT

I hereby agree to plead guilty to: COUNT 2. - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony – NRS 201.230) and COUNT 5 – POSSESSION OF VISUAL PRESENTATION DEPICTING SEXUAL CONDUCT OF PERSON UNDER SIXTEEN YEARS OF AGE (Category B Felony - NRS 200.700, 200.730), as more fully alleged in the charging document attached hereto as Exhibit" "1".

My decision to plead guilty is based upon the plea agreement in this case which is as follows:

The State has agreed to retain the right to argue at rendition of sentence. After sentencing, the State will not oppose dismissal of the remaining counts in the instant case.

CONSEQUENCES OF THE PLEA

I understand that by pleading guilty I admit the facts which support all the elements of the offense(s) to which I now plead as set forth in Exhibit "1".

I understand that as a consequence of my plea of guilty as to Count 2, the Court must sentence me to imprisonment in the Nevada Department of Corrections for life with the possibility of parole beginning at 10 yrs (120 months). The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand

that I may also be fined up to $10,000.00. I understand that the law requires me to pay an Administrative Assessment Fee.

I understand that as a consequence of my plea of guilty as to Count V, the Court must sentence me to imprisonment in the Nevada Department of Corrections for a minimum term of not less than one (1) year and a maximum term of not more than six (6) years. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also be fined up to $5,000.00.

I understand that, if appropriate, I will be ordered to make restitution to the victim of the offense(s) to which I am pleading guilty and to the victim of any related offense which is being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to reimburse the State of Nevada for any expenses related to my extradition, if any.

I also understand that pursuant to NRS 176.139 and my plea of guilty to a sexual offense for which the suspension of sentence or the granting of probation is permitted, the Division of Parole and Probation shall arrange for a psychosexual evaluation as part of the division's presentence investigative report to the Court.

I understand that I am not eligible for probation unless that psychosexual evaluation certifies that I do not represent a high risk to reoffend. I understand

that, except as otherwise provided by statute, the question of whether I receive probation is in the discretion of the sentencing judge.

Further, that *before I am eligible for parole* a panel consisting of the administrator of the mental health and developmental services of the department of human resources or his designee; the director of the department of corrections or his designee; and a psychologist license to practice in this state or a psychiatrist license to practice medicine in this state certifies that I was under observation while confined in an institution of the department of corrections that I do not represent a high risk to reoffend based upon a currently accepted standard of assessment.

I further understand that the Court will include as part of my sentence, in addition to any other penalties provided by law, lifetime supervision commencing after any period of probation or any term of imprisonment and period of release upon parole; said special sentence of lifetime supervision must begin upon release from incarceration.

I further understand that the Court will include as part of my sentence, in addition to any other penalties provided by law, pursuant to NRS 179D.450, I must register as a sex offender within 48 hours of release from custody.

I also understand that I must submit to blood and/or saliva tests under the Direction of the Division of Parole and Probation to determine genetic markers

and/or secretor status.

I understand that if more than one sentence of imprisonment is imposed and I am eligible to serve the sentences concurrently, the sentencing judge has the discretion to order the sentences served concurrently or consecutively.

I also understand that information regarding charges not filed, dismissed charges, or charges to be dismissed pursuant to this agreement may be considered by the judge at sentencing.

I have not been promised or guaranteed any particular sentence by anyone. I know that my sentence is to be determined by the Court within the limits prescribed by statute.

I understand that if my attorney or the State of Nevada or both recommend any specific punishment to the Court, the Court is not obligated to accept the recommendation.

I understand that if the State of Nevada has agreed to recommend or stipulate a particular sentence or has agreed not to present argument regarding the sentence, or agreed not to oppose a particular sentence, such agreement is contingent upon my appearance in court on the initial sentencing date (and any subsequent dates if the sentencing is continued). I understand that if I fail to appear for the scheduled sentencing date or I commit a new criminal offense prior to sentencing the State of Nevada would

regain the full right to argue for any lawful sentence.

I understand if the offense(s) to which I am pleading guilty to was committed while I was incarcerated on another charge or while I was on probation or parole that I am not eligible for credit for time served toward the instant offense(s).

I understand that as a consequence of my plea of guilty, if I am not a citizen of the United States, I may, in addition to other consequences provided for by federal law, be removed, deported, excluded from entry into the United States or denied naturalization.

I understand that the Division of Parole and Probation will prepare a report for the sentencing judge prior to sentencing. This report will include matters relevant to the issue of sentencing, including my criminal history. This report may contain hearsay information regarding my background and criminal history. My attorney and I will each have the opportunity to comment on the information contained in the report at the time of sentencing. Unless the District Attorney has specifically agreed otherwise, then the District Attorney may also comment on this report.

WAIVER OF RIGHTS

By entering my plea of guilty, I understand that I am waiving and forever giving up the following rights and privileges:

1. The constitutional privilege against self-incrimination, including the right to refuse to testify at trial, in which event the prosecution would not be allowed to comment to the jury about my refusal to testify.

2. The constitutional right to a speedy and public trial by an impartial jury, free of excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the assistance of an attorney, either appointed or retained. At trial the State would bear the burden of proving beyond a reasonable doubt each element of the offense charged.

3. The constitutional. right to confront and cross-examine any witnesses who would testify against me.

4. The constitutional right to subpoena witnesses to testify on my behalf.

5. The constitutional right to testify in my own defense.

6. The right to appeal the conviction, with the assistance of an attorney, either appointed or retained, unless the appeal is based upon reasonable constitutional jurisdictional or other grounds that challenge the legality of the proceedings and except as otherwise provided in subsection 3 of NRS 174.035.

VOLUNTARINESS OF PLEA

I have discussed the elements of all of the

original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.

I understand that the State would have to prove each element of the charge(s) against me at trial.

I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.

All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.

I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest.

I am signing this agreement voluntarily. after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.

I am not now under the influence of any intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.

My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied

with the services provided by my attorney.

DATED this 16 day of November, 2006.

/s/
ROBERT JOSEPH GIESING
Defendant

AGREED TO BY:

/s/
ERIC JORGENSON
Chief Deputy District Attorney
Nevada Bar #001802

CERTIFICATE OF COUNSEL:

I, the undersigned, as the attorney for the Defendant named herein and as an officer of the court hereby certify that:

1. I have fully explained to the Defendant the allegations contained in the charge(s) to which guilty pleas are being entered.

2. I have advised the Defendant of the penalties for each charge and the restitution that the Defendant may be ordered to pay.

3. All pleas of guilty offered by the Defendant pursuant to this agreement are consistent with the facts known to me and are made with my advice to the Defendant.

4. To the best of my knowledge and belief, the Defendant:

a. Is competent and understands the charges and the consequences of pleading guilty as provided in this agreement.

b. Executed this agreement and will enter all guilty pleas pursuant hereto voluntarily.

c. Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time I

consulted with the defendant as certified in paragraphs 1 and 2 above.

Dated: This 16 day of November, 2006.

/s/
ATTORNEY FOR DEFENDANT

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[DATE STAMP]
FILED
DEC 20 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROBERT J. GIESING,
Petitioner - Appellant,

v.

No. 10-16350
D.C. No. 2:09-cv-01221-GMN-PAL
District of Nevada, Las Vegas

BRIAN WILLIAMS, Sr.; et al.,
Respondents - Appellees.

ORDER

Before: LEAVY and RYMER, Circuit Judges.

Appellant's motion for reconsideration is denied. *See* 9th Cir. R. 27-10.

No further filings shall be accepted in this closed case.